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WM. R. STANS

Supreme Court of the United States

October Term 1923

No. 109

GUARANTY TITLE & TRUST CORPORATION,
Receiver of VUE DE L'EAU COMPANY,
a corporation, Intervenor, Appellant

v.

THE UNITED STATES.

BRIEF ON BEHALF OF APPELLANT

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STATEMENT OF THE CASE.

On the 28th day of June 1917, acting under authority of an Act of Congress approved on June 15, 1917, (Public No. 23, 65 Congress) the President of the United States of America, on behalf of the United States of America, took title to and possession of a large tract of land described in the Act, situate on Hampton Roads, in the State of Virginia, and ever since then the United States of America has been in exclusive possession of it.

This tract of land included a parcel of land containing 9.22 acres, more or less, having frontage of approximately 1400 feet on the water, which was claimed by Norfolk-Hampton Roads Company.

A board known as "Board on Compensations for Site, Naval Operating Base, Hampton Roads, Virginia," appointed by the Secretary of the Navy in accordance with the President's proclamation of June 28, 1917, made a report in which it found that the fair value of this parcel of 9.22 acres, known as the "Pine Grove Block", was $37,000.00. This sum was unsatisfactory to Norfolk-Hampton Roads Company, and it requested the payment of seventy-five per cent. of that amount as provided for by said Act of Congress, but the United States would make no payment whatever on this parcel of land because there was a question as to the validity of said Company's title to a portion of this parcel known as the "Prize Lot Reserve", consisting of 4.55 acres, more or less, with a frontage of about 690 feet on Hampton Roads. (R. 12).

Thereupon on December 7, 1920, the Norfolk-Hampton Roads Company filed its petition in the United States Court of Claims against United States of America, claiming that it was the owner of this parcel of 9.22 acres, and entitled to receive compensation therefor. (R. 1-5). In this petition the Norfolk-Hampton Roads Company alleges that it has a good title of record to a large portion of this parcel of land, and "a good title by adverse possession" to the remainder thereof. (R. 2). It further alleges (R. 3) that the reason assigned by the Board of Compensation for Site for not paying to it seventy-five per cent.

of the amount fixed as the value of the land, was that as to approximately one-half of said parcel of land said Company had title only by adverse possession, and that the Board was not satisfied that such possession had been of sufficient length of time to ripen into a measurably good title.

While this petition was pending in the Court of Claims, to-wit, on the 12th day of April, 1921, the Circuit Court of the City of Norfolk, Virginia, in a suit brought by a stockholder of the Vue de L'Eau Company, a Virginia Corporation, suing on behalf of himself and other stockholders, appointed the Guaranty Title and Trust Corporation the Receiver of the Vue de L'Eau Company, and directed it to collect and take charge of all property belonging to the Vue de L'Eau Company, with power to intervene in any proceeding pending in other Courts for the purpose of making claim to and recovering the property of said Company, or its value. (R. 9-10).

Pursuant to this authority the Guaranty Title and Trust Corporation, Receiver of Vue de L'Eau Company, on the 31st day of May, 1921, by leave of Court filed its petition in the Court of Claims in the cause which had been instituted by Norfolk-Hampton Roads Company against the United States. (R. 5-9). In this intervening petition it claimed that the Vue de L'Eau Company was a Virginia Corporation, with its principal office in the City of Norfolk, Virginia; that it was the owner of the parcel of land known as the "Prize Lot Reserve," containing about five acres lying on Hampton Roads, it being a portion of the property purchased by the Vue de L'Eau Company in 1871;

that this property, along with other property, had been taken by the President of the United States under authority of the Act of Congress approved June 15, 1917, and that the petitioner as Receiver of Vue de L'Eau Company was entitled to receive just compensation therefor; that Norfolk-Hampton Roads Company had instituted proceedings in the Court of Claims against the United States in which it claimed to be the owner of this parcel of land and entitled to receive compensation therefor. The petitioner asked leave to intervene in said proceedings and prayed that the title of Vue de L'Eau Company to said parcel of land be recognized by the Court and that it be allowed just compensation therefor.

The point in controversy between the appellant as Receiver of Vue de L'Eau Company and the Norfolk-Hampton Roads Company, was the ownership of this parcel of land containing 4.55 acres. It was conceded that the Vue de L'Eau Company had the record title to this land, but the Norfolk-Hampton Roads Company claimed that it had acquired title thereto by adverse possession.

Considerable evidence was taken on behalf of each party, briefs were filed, and on May 22, 1922, the case was argued before the Court of Claims and submitted on its merits. (R. 11).

On June 26th, 1922, the Court of Claims announced its Findings of Fact and Conclusions of Law, and rendered judgment in favor of Norfolk-Hampton Roads Company, and dismissed the petition of the Receiver of Vue de L'Eau Company. (R. 11-15).

In its "Findings of Fact" the Court found that prior to the year 1874, the entire parcel of 9.22 acres belonged to the Vue de L'Eau Company, a Virginia Corporation; that in January, 1874, this Company executed a deed of assignment for the benefit of its creditors whereby it conveyed to certain trustees all of its land except the land embraced in said "Prize Lot Reserve," containing 4.55 acres; and that with the exception of seven lots sold by the Vue de L'Eau Company in 1873, it had the record title to the "Prize Lot Reserve;" that in the year 1899 the Norfolk-Hampton Roads Company purchased the parcel of 9.22 acres of land, *with the exception of the said portion of it known as the "Prize Lot Reserve,"* containing 4.55 acres, and also purchased a large acreage of adjacent land.

In other words, the Court of Claims found that the Norfolk-Hampton Roads Company had acquired by purchase 4.67 acres of the parcel of 9.22 acres, and that the Vue de L'Eau Company had the *record title* to the remainder of said parcel containing 4.55 acres, at the time the property was taken by the United States, but that the Norfolk-Hampton Roads Company had acquired title thereto by adverse possession.

In Finding VII. (R. 13-14) the Court sets forth the acts done by Norfolk-Hampton Roads Company to acquire title by adverse possession.

The Court further found (see Finding IX–R. 14) that the portion of the said 4.55 acres of the "Prize Lot Reserve" which remained to the Vue de L'Eau Company after it had sold the seven lots already

mentioned, was worth the sum of $33,000.00 on June 28, 1917, when it was taken by the United States.

Upon these "Findings of Fact" the Court of Claims decided "as conclusions of law" that the Norfolk-Hampton Roads Company was entitled to recover the value of the entire parcel of 9.22 acres, which, as already stated, included the "Prize Lot Reserve," and that the Guaranty Title and Trust Corporation, Receiver of Vue de L'Eau Company, was not entitled to recover the value of the "Prize Lot Reserve," viz., $33,000.00. (R. 15).

It therefore rendered a judgment in favor of the Norfolk-Hampton Roads Company for $68,500.00, the value of the entire tract of 9.22 acres, and dismissed the petition of the Receiver of the Vue de L'Eau Company.

On July 31, 1922, the Guaranty Title and Trust Corporation, Receiver of Vue de L'Eau Company, made application for an appeal from this judgment, and on August 1, 1922, an appeal was allowed. (R. 16).

SPECIFICATION OF ERRORS.

The appellant assigns the following errors to the decision and judgment of the Court of Claims:

(1) In deciding as a conclusion of law from the Findings of Fact, that Norfolk-Hampton Roads Company acquired title by adverse possession to that portion of the 4.55 acres of land known as "Prize Lot Reserve," which was claimed by Vue de L'Eau Company and to which it had the record title.

(2) In deciding as a conclusion of law from the Findings of Fact that Norfolk-Hampton Roads Company was the owner, and as such was entitled to recover the sum of $33,000.00 as the value of the above mentioned parcel of land described in Finding IX.

(3) In deciding as a conclusion of law from the Findings of Fact that the Vue de L'Eau Company was not the owner of said parcel of land described in Finding IX and that its Receiver was not entitled to recover its value, viz., $33,000.00, and in dismissing the petition of said Receiver and rendering a judgment for costs against it.

(4) In failing to decide as a conclusion of law from the Findings of Fact that the Vue de L'Eau Company was the owner of the said parcel of land and that its Receiver was entitled to recover its value, viz., $33,000.00.

ARGUMENT.

The question presented in this case is: Who was the owner of a parcel of land known as the "Prize Lot Reserve," containing 4.55 acres, less seven lots already sold, on June 28, 1917, when said parcel of land was taken by the United States?

The true owner, whoever it may be, is entitled to recover of the United States the sum of $33,000.00, the valuation placed by the Court of Claims upon said parcel of land.

It is conceded that the Vue de L'Eau Company acquired title to this land and became the fee simple

owner thereof prior to 1874, and that on June 28, 1917, it was still the fee simple owner (except as to seven lots sold in the year 1873) unless the Norfolk-Hampton Roads Company had in the meanwhile acquired title thereto by adverse possession.

So, the fundamental question to be decided is: Did the Norfolk-Hampton Roads Company acquire title to this parcel of land by adverse possession?

In the second paragraph of Finding VII (R. 14) the Court sets forth the acts done by Norfolk-Hampton Roads Company in its efforts to acquire title to this land by adverse possession.

We quote the language of the Court, but for the purpose of convenient discussion we have adopted our own arrangement and have lettered each separate act:

> "The plaintiff company (*i. e.* Norfolk-Hampton Roads Company) upon its purchase in 1899, of its large holdings of land inclosing (*i. e.* surrounding) said Prize Lot Reserve on its land sides, took possession of said holdings and from thenceforward to the time of its taking by the Government on June, 1917, treated the land of said Reserve as though it belonged to the plaintiff company.
>
> (a) It recorded plats of its said property in which the land of said Reserve was included and indicated as a part of the company's holdings.
>
> (b) The company's advertising matter issued in 1899 indicated as belonging to the company lands which included the lands of said

Reserve, and said land was included in the company's subdivision known as "Subdivision No. 1, Norfolk on the Roads," a plat of which stating said subdivision to be the "Property of Norfolk-Hampton Roads Company," was recorded in the County Clerk's office on June 14, 1901.

(c) In the development of its said property, streets were opened and graded through the land of said Reserve;

(d) timber was cut therefrom and used or marketed by the company;

(e) and bulkheads were built by the company in front of the property to protect it from erosion by the waves and tides.

(f) Said Company also leased an area of its lands to the Jamestown Exposition Company in 1907, including therewith said Prize Lot Reserve land as belonging to plaintiff company,

(g) and thereafter, upon the termination of the Exposition Company's lease, said lands were leased by plaintiff company to another tenant, by whom they were occupied for some time.

(h) And in general, the land of said Reserve was held out and treated by plaintiff company as being the property of said company. It does not satisfactorily appear who, if anyone, paid the taxes on said land between the year 1874 and 1917."

While the Court of Claims did not *expressly* decide that these acts constituted adverse possession sufficient to vest title to the land in the Norfolk-Hampton Roads Company, still it inferentially decided this, because otherwise that Company would not have been entitled to recover the value of the "Prize Lot Reserve." In other words, before the Court of Claims could render judgment in favor of the Norfolk-Hampton Roads Company for the value of this land, it must have decided that it was the owner of the land and had acquired title thereto by adverse possession.

It therefore sufficiently appears that the Court of Claims decided that the acts set forth in Finding VII constituted actual adverse possession sufficient to vest title under the Virginia law. In this, we respectfully submit, the Court erred.

It is the appellant's contention that the conclusion of the Court of Claims is not justified by its Findings of Fact, but on the contrary, these Findings of Fact lead irresistibly to the conclusion of law that the Norfolk-Hampton Roads Company did not acquire title to this land by adverse possession under the Virginia law which governs this case.

It therefore becomes necessary to inquire into the Virginia law as to adverse possession and its constituent elements.

Section 2917 Va. Code (1887), now Sec. 5805 Va. Code (1919), is as follows:

> "*Limitation of entry on or action for land.*—No person shall make an entry on, or bring an action to recover, any land lying east of the

> Alleghany mountains, but within *fifteen years*, or any land lying west of the Alleghany mountains, but within ten years, next after the time at which the right to make such entry or bring such action shall have first accrued to himself or to some person through whom he claims. For the purposes of this section the county of Carroll shall be held and considered as lying wholly west of the Alleghany mountains."

While this statute does not in express words refer to adverse possession, it has been uniformly construed to mean that in order to bar the true owner's right of action to recover his land, the disseisor must have been in actual, uninterrupted, adverse possession thereof for a period of fifteen years in this section of Virginia.

Or, to state the matter differently, a disseisor cannot acquire title to land except by actual, uninterrupted, adverse possession thereof for a period of fifteen years.

In *Hollingsworth* v. *Sherman*, 81 Va. 571, the Virginia Court said:

> "This possession, however, to bar the plaintiff's right of entry must continue, not only through the period of statutory limitation, but it must be of the quality and character which the law requires. It must be uninterrupted, honest and adverse. Such possession for the period prescribed by the statute, not only gives a right of possession which cannot be divested by entry, but also gives a right of entry and of action, if the party is plaintiff, which will enable him to recover, even against the strongest proof of title, which, independently of such continued

> adversary possession, would be a better title. This possession must be adverse, grounded upon an ouster or dispossession of the real owner; a possession under claim of title, is in reference to conflicting claims and the statutory prescriptive bar; it must consist of an *actual, exclusive, continued, visible, notorious, and hostile possession under a colorable claim of title.*"

Professor Minor, the great authority on Virginia land law, says: "In order that possession may have the effect of barring the entry, etc., of a claim, it must be long, uninterrupted, honest and adverse." Again, he says:

> "Hence, to constitute an adverse possession, there must be a *possession under claim of title;* or in reference to conflicting claims, and the statutory prescriptive bar, it must consist of an *actual, exclusive, continued, visible, notorious, and hostile* possession, under a colorable claim of title."

2 Min. Inst. (4th ed.) 577-580.

Professor Graves, of the University of Virginia, in his work on Real Property, thus states the effect of this statute:

> "*Effect of the Statutes.*—It must be remembered that no owner of land can be barred of his title unless he has been *put to his entry or action* for the statutory period, and this cannot be unless the owner is out of possession of his land with a claimant in the possession of it,

holding it *adversely* to the owner. *Such claimant must be in adverse possession.*"

Graves on Real Property, Sec. 138.

In the following section this eminent jurist states the essential elements of adverse possession:

"*What is Adverse Possession of Land?*—In order to be *adverse*, the defendant's possession must be (1) actual: (2) open and notorious; (3) exclusive; (4) in defiance of and hostile to the true owner (plaintiff); (5) and with *claim of title in himself. Taylor* v. *Burnsides*, 1 Gratt. (165) (190); *Andrews* v. *Roseland, etc., Co.*, 89 Va. 393; *Core* v. *Faupel*, 24 W. Va. 238; *Sharon* v. *Tucker*, 144 U. S. 533; 1 Am. & Eng. Ency. Law (2nd ed.) 789. And to bar the owner, such adverse possession must continue *without interruption* for the statutory period. Let us examine these requisites in their order."

Graves on Real Property, Sec. 139.

While the Findings of Fact show that the Norfolk-Hampton Roads Company at times exercised certain acts of ownership over this land, they fail to show that said Company was in actual, uninterrupted, adverse possession thereof for a period of fifteen years, which is necessary under the Virginia law in order to acquire title.

We submit that two of the essentials of adverse possession were not present: (1) Prior to 1907 it was never in actual possession of this land; and (2) at no time did it have a claim of right or title thereto.

In the year 1899 the Norfolk-Hampton Roads Company purchased land adjoining the parcel of land in controversy. It claims that shortly after this purchase it began exercising acts of ownership over the disputed parcel to which it had no title whatsoever. This parcel of land was taken by the United States on June 28, 1917. Therefore, in order to have acquired title to this land by adverse possession, it was necessary under the Virginia law for the Norfolk-Hampton Roads Company to show that it was in actual, uninterrupted, adverse possession thereof for at least fifteen years prior to June 28, 1917. This possession must have been actual, continuous and uninterrupted during that period of time.

And it must be borne in mind that the burden rests on the party claiming title to land by adverse possession to prove clearly all of the essential elements of adverse possession.

In *Parkersburg Co.* v. *Schultz* (W. Va.) 27 S. E. 255, 256, it is said:

> "Here we must first note that, as it defeats the true title, adversary possession must be taken strictly, and the facts to sustain it proven clearly."

And again:

> "A party relying on adverse possession must show clearly all the requirements of the doctrine."

In *Sims* v. *Capper*, 133 Va. 278-286, it is said:

> "The claim of title is as essential as the possession, in order to constitute adversary

possession; and the burden of proof to show both is upon those asserting the acquisition of title by such possession whether with or without color of title."

Let us now examine some of the Virginia decisions on the subject of what constitutes actual possession.

What Constitutes Actual Possession:

The leading case in Virginia on the subject of adverse possession is *Taylor* v. *Burnsides*, 1 Gratt. (42 Va.) 165. For more than three-quarters of a century the rulings in this case have been regarded and revered in Virginia as canons of the law of real property. In that case Judge Baldwin said (page 192):

> "An adversary possession must also be actual, in reference to the means by which it is acquired. In that sense, I understand an actual possession to be the occupation, use or enjoyment of the subject matter of controversy, by residence, cultivation, improvement, or other open, notorious and habitual acts of ownership. Of these modes of occupation, use or enjoyment, residence, cultivation, and improvement, respectively, while they continue, are usually the most obvious and decisive."

Further on (page 198) in his opinion he says with reference to wild and uncultivated lands such as this land:

> "It follows from what has been said, that wild and uncultivated lands cannot be made the

> subjects of adversary possession, while they remain completely in a state of nature. A change in their condition, to some extent, is therefore essential; and the acts by which it is effected are often the strongest evidence of actual possession. Without such change, accomplished or in progress, there can be no residence, cultivation or improvement, no occupation, use or enjoyment. Evidence short of this may prove an adversary claim; but, in the nature of things, cannot establish an adversary possession. Nor is there any reason for relaxing the rules of law on this subject, in behalf of the adversary claimant of such property. There ought to be no presumption in his favor against the better title. *It is in vain for him to say, that he has had all the possession of which the property was then susceptible; for that would lead to a constructive possession, which is only attributable to the rightful owner.*"

And still further on (page 201) he says:

> "There can be no ouster of the constructive possession of the older patentee, but by an actual adversary possession; and of this wild and uncultivated lands, completely in a state of nature, are not susceptible. An adversary possession of them can only be acquired by acts producing a change in their condition."

In enumerating some of the acts not sufficient for this purpose, he says (pages 206, 207):

> "Payment of taxes, prohibition of trespasses, surveys of the land, sales and convey-

> ances of it; though they may serve to show a claim of title, are not evidence of actual possession. Even the cutting and selling of timber by the tenant himself, or by his authority, is but a transient trespass, unless habitual."

This case has been repeatedly and consistently followed in Virginia.

In the case of *Harman* v. *Ratliff* (1893) 93 Va. 249, 253, it is said:

> "While lands remain uncleared, or in a state of nature, they are not susceptible of adverse possession against the older patentee, unless by acts of ownership effecting a change in their condition, and to constitute adverse possession there must be occupancy, cultivation, improvement or other open, notorious, and habitual acts of ownership."

In the *City of Richmond* v. *Jones* (1910) 111 Va. 214, 217, it was claimed that because the property in question was not capable of being cultivated, that this constituted an excuse for not actually occupying it, and that under these circumstances actual occupancy was not necessary to constitute adverse possession. But the Court overruled this contention, and President Keith, in delivering the opinion of the Court, said on this point:

> "Surely the proof of absence of occupancy and improvement by fencing, cultivation or otherwise, however good or sufficient the reason for not building, or not fencing, or not cleaning or performing any other act of ownership may

> be, cannot prove or tend to prove a claim by adversary possession. If it were otherwise, it is conceivable that lands remaining in a state of nature might be recovered by adversary possession, or the possession might be retained against the older patentee by proving, item by item, and circumstance, a plausible excuse to the jury for the failure to do or perform this or that act essential to adversary possession."

In *Whealton* v. *Doughty* (1911), 112 Va. 649, this ruling was made:

> "If title by adverse possession can be acquired of marsh lands on the seashore, separate and distinct from the rights of the riparian owner, the mere fact that the adverse claimant and his predecessors in title permitted their cattle to roam over said marshes when not covered by water, just as they roamed over adjacent marsh lands, and that they cut grass from the marsh lands and hauled it away for use as manure on their highlands, does not constitute such actual possession as will deprive the true owner of his title."

In Providence etc., Club v. *Miller Manufacturing Co.* (1915) 117 Va. 129, it was held that fishing and hunting on a pond, renting boats to others to fish and hunt thereon and instructing one's agent not to permit others to boat or fish on the pond without the principal's permission, were not such acts of adverse possession as would confer title as against an adjacent owner who used the pond for boating and fishing whenever he desired to do so.

Perhaps the most recent Virginia decision on this precise question is *Craig-Giles Iron Co.* v. *Wickline*, 126 Va. 223, decided on November 20, 1919. Judge Kelly, in delivering the opinion of the court, reviews the principal previous Virginia cases on the subject. In that case it appeared that the parties who claimed title by adverse possession had cut and sold timber from the land at various times, and had attempted to convey portions of the land; that they claimed to be owners of the land, and were generally reputed in the neighborhood to be the owners of it; that the land was assessed on the land books in their names, and taxes on it paid by them, and that they had forbidden trespassing thereon. The court decided that while such evidence made out a case of continuous *claim* to the land, it was wholly insufficient " to establish title thereto by *adverse possession.*"

Judge Kelly, in delivering the opinion of the court, said:

> "The additional acts of paying taxes, asserting title and forbidding trespasses do not aid a situation like this. The primary fact of actual possession must first be established. When this is done, proof of such additional acts is admissible, not as showing the possession itself, but as showing its good faith, exclusiveness, notoriousness and hostility."

In *Chilton* v. *White*, 72 W. Va. 545, 78 S. E. 1048, it is said:

> "Occasional cutting of timber on, and ranging cattle over, wild and unclosed land is not

such occupation of it as will amount to adverse possession."

In *Core* v. *Faupel*, 24 W. Va. 238, it is said:

> "The most usual and decisive acts of actual possession are occupation, residence, cultivation, enclosure, and improvement."

It will be observed from the "Findings of Fact" that prior to 1907 no portion of this land was enclosed; no portion of it was occupied by anyone; no portion of it was in cultivation, but practically all of it was in forest growth, and there were no buildings or improvements of any kind on it. These are the usual and decisive acts of actual possession and yet none of them was present prior to 1907. In fact, in Finding VI, it is said that from 1874 until the appointment of a receiver, in 1921, the Vue de L'Eau Company took no action with reference to this land and "the said land and lots were allowed to remain in their former condition and to further develop forest growth thereon."

Let us now consider, in their order, the several acts done by the Norfolk-Hampton Roads Company with reference to this land which the Court of Claims held constituted actual adverse possession:

> (a) "It recorded plats of its said property in which the land of said Reserve was included and indicated as a part of the company's holdings.
>
> (b) "The company's advertising matter issued in 1899, indicated as belonging to the

> ...npany lands which included the lands of said Reserve, and said land was included in the company's subdivision known as 'Subdivision No. 1, Norfolk on the Roads,' a plat of which, stating said subdivision to be the 'Property of Norfolk-Hampton Roads Company,' was recorded in the County Clerk's office on June 14, 1901."

Surely the recording of plats and publishing advertising matter cannot be considered as any evidence whatsoever of adverse possession. The rights of no one were affected by these actions of the Norfolk-Hampton Roads Company, and no one could prevent this. The most that can be said about these actions is that they indicated the Company was making a claim to the land.

In *Craig-Giles Iron Co.* v. *Wickline* (*Supra*), it was held that while evidence that land was assessed in the name of certain parties and the taxes on it paid by them and that they had forbidden trespassing thereon might show that they were making a *claim* to the land, it was wholly insufficient to "establish title thereto by adverse possession."

> (c) "In the development of its said property, streets were opened and graded through the land of said reserve;
>
> (d) timber was cut therefrom and used or marketed by the company;
>
> (e) and bulkheads were built by the company in front of the property to protect it from erosion by the waves and tides."

In the first place, the Court does not indicate to what extent "streets were opened and graded" and when this took place. The question of date is a very important one. Because, unless this were accomplished prior to June 28, 1902, and continued uninterruptedly for fifteen years thereafter, it would be no evidence at all of adverse possession.

The same may be said as to the cutting of timber. The Court does not find the extent of timber cutting, whether occasional or habitual, when it began and during what time it took place. This is important on the question of adverse possession.

In the case of *Taylor* v. *Burnsides*, 1 Gratt. (42 Va.) 165, 206, 207, it was said:

> "Payment of taxes, prohibition of trespasses, surveys of land, sales and conveyances of it, though they may serve to show a claim of title, are not evidence of actual possession. Even the cutting and selling of timber by the tenant himself, or by his authority, is but a transient trespass, unless habitual."

In *Chilton* v. *White*, 72 W. Va. 545, 78 S. E. 1048, it is said:

> "Occasional cutting of timber on, and ranging cattle over, wild and unclosed land is not such occupation of it as will amount to adverse possession."

In *Craig-Giles Iron Co.* v. *Wickline*, 126 Va. 223, it was held that the mere cutting and selling of timber at widely separated intervals did not constitute actual

possession, but that to sustain the defense of adverse possession, the defendants must have entered upon the land in controversy and taken possession thereof "by residence, improvement, cultivation, or other open, notorious and habitual acts of ownership." Judge Kelly, in delivering the opinion of the Court, uses the following language, which we have already quoted:

> "The additional acts of paying taxes, asserting title and forbidding trespasses do not aid a situation like this. The primary fact of actual possession must first be established. When this is done, proof of such additional acts is admissible, not as showing the possession itself, but as showing its good faith, exclusiveness, notoriousness and hostility."

The same considerations also apply to the act of the company in building bulkheads in front of the property to protect it from erosion.

In *Pasley* v. *English*, 5 Gratt. (46 Va.) 141, it was held that a temporary possession of land by cutting and sawing timber upon it was not such adversary possession as would give title.

In Hutcheson on Land Titles in Virginia and West Virginia, Section 365, we find this statement:

> "*Occasional acts of trespass.*—Fugitive cutting trees; stripping bark; surveys; cutting grass; tapping sugar trees in a forest from year to year, uninclosed; piling wood upon a vacant lot; digging and selling sand from time to time; annually entering upon land to cut timber, feed cattle, hunt or fish, with cultivation of truck

> patch in summer, as incidental to other pursuits; ranging cattle, or other like acts, amounting to mere trespasses, are not sufficient to establish actual possession."

All of the foregoing acts show that the Company was making some kind of a claim to the land and was exercising some acts of ownership over it but they are wholly insufficient to establish the fact of actual possession. We respectfully submit that the Court of Claims confused acts of ownership exercised over the property with actual possession of the property itself.

> (f) "Said company also leased an area of its lands to the Jamestown Exposition Company in 1907, including therewith said Prize lot Reserve land as belonging to plaintiff company,
>
> (g) and thereafter, upon the termination of the Exposition Company's lease, said lands were leased by plaintiff company to another tenant, by whom they were occupied for some time."

We may assume that actual adverse possession began in 1907 when the Norfolk-Hampton Roads Company leased this and other property to the Jamestown Exposition Company, who actually occupied it, and that by a subsequent lease to another tenant, who occupied it for some time, such adverse possession continued until June 28, 1917, when the land was taken by the United States. But this covers a period of only ten years, whereas, the Virginia statute requires actual, uninterrupted, adverse possession for a con-

tinuous period of fifteen years. In other words, assuming that this was actual adverse possession, it had not continued long enough to give the Norfolk-Hampton Roads Company *title to the land*, and, therefore, in 1917, when it was taken by the Government, the Vue de L'Eau Company was still the owner of the land.

We think it is perfectly clear from the Findings of Fact that there was no actual adverse possession of this land prior to the year 1907.

> (h) "And in general, the land of said Reserve was held out and treated by plaintiff company as being the property of said company. It does not satisfactorily appear who, if anyone, paid the taxes on said land between the year 1874 and 1917."

This certainly is no evidence of actual adverse possession.

It is well settled that this is not the criterion of possession. If it were so, it would lie in the power of any man to fix the legal standard to suit himself. Where a man is the lawful owner of property, it is not necessary for him to be in *actual* possession of it. His title papers speak for themselves and give him *constructive* possession. He may be in actual possession or not, as he likes. But when he attempts to acquire title to another man's property by adverse possession, the law requires him to take *actual* possession, evidenced by visible and notorious acts.

This question is set at rest in Virginia by the decision in *Taylor* v. *Burnsides*, 1 Gratt. (42 Va.) 165, 195.

Minnesota... St. Paul, Min...

Judge Baldwin, in delivering the opinion of the Court, said:

> "That acts of ownership on the property indicate an adverse claim, is not, as I humbly conceive, sufficient, unless they amount to an adverse possession, that is to the occupancy, use of enjoyment of the premises. *Nor is it sufficient that they show a continued claim of the party, such as he would exercise over property which he claimed in his own right, and would not exercise over property which he did not claim.*"

And in that case it was decided that instructions predicated on the theory that the possession which an owner exercised over his own land was sufficient—were incorrect and should have been refused. (See pages 204, 205 and 206 of that volume).

In the light of these convincing Virginia authorities, we submit that the acts relied upon by the Court of Claims as constituting actual adverse possession of this land are clearly insufficient for that purpose. In other words, the conclusions of law of the Court of Claims are not justified by its Findings of Fact.

In Rule I of this Court, relating to appeal from the Court of Claims, it is provided in paragraph 2, that the record from the Court of Claims shall contain:

> "A finding by the Court of Claims of the facts in the case, established by the evidence, in the nature of a special verdict, but not the evidence establishing them; and a separate statement of the conclusions of law upon said facts on which the court founds its judgment or

decree. The finding of facts and conclusions of law to be certified to this court as part of the record."

Under this rule, the Findings of Fact are in the nature of *a special verdict* and *they should be sufficient in and of themselves to justify the conclusion of law.*

It is submitted that these Findings by the Court of Claims are utterly insufficient to establish adverse possession for the statutory period of fifteen years, under the Virginia law. The only acts done by the Company on the land itself, as found by the Court, were opening and grading some streets through a portion of this land, cutting some timber therefrom, and building a bulkhead in front of the property. The extent of these acts, the times when they were committed, and the duration thereof, do not appear in the Findings. And, under the Virginia law, as we have already shown, these are most important when we are considering the question of whether or not they amounted to actual, uninterrupted, and continuous possession.

Claim of Right or Title Necessary:

But there is another reason why the claim of the Norfolk-Hampton Roads Company must be denied. We have already seen that one of the elements of adverse possession in Virginia, is a claim of right or title. We submit that the Norfolk-Hampton Roads Company had no claim of right or title to this land but was a wrong-doer from the outset.

In Finding VII (R. 13-14), the Court of Claims said, that after the Norfolk-Hampton Roads Company purchased the adjoining land it "* * * * without any right, title or interest, or claim of right, title or interest, in or to the lots or land of said Prize Lot Reserve, and with full knowledge of the fact that it had no claim of right, title or interest in or to any part of said lots or land, *deliberately set about trying to acquire title to said lots and land by adverse possession.*"

So here we have a case of a company attempting to take possession of "*property of some intrinsic value, belonging to another, without his assent, and with the intention to deprive the owner thereof permanently.*" Every element of common law larceny is present save only the asportation. It would be a reproach to our civilization if title could be acquired in this manner.

In *Kincheloe* v. *Tracewells*, 11 Gratt. (52 Va.) 587, 605, Judge Lee, in delivering the unanimous opinion of the Court, said:

> "An entry by one upon land in possession, actual or constructive, of another, in order to operate as an ouster and gain a possession to the party entering, must be accompanied by a claim of title; but it is not indispensable that the claim should be ostensible in the form of a deed or any other writing. The claim, from its nature and character, may be wholly independent of any written evidence."

In *Creekmur* v. *Creekmur*, 75 Va. 430, 435, which was an action of ejectment, it was held that one of the essential elements of adverse possession was a bona-fide claim of title.

In delivering the opinion of the Court, Judge Staples says:

> "It is not necessary in the present instance to attempt any general definition of what is meant by 'adversary possession.' It is sufficient to say that, according to the best authorities, a possession to be adverse must be actual, exclusive, open and notorious. It must be accompanied with a bona-fide claim of title against the title of all other persons, and it must be continued for the period prescribed by the statutory bar. A mere naked possession without a claim of right, no matter how long continued, never ripens into a good title, but is regarded as being held for the benefit of the true owner. In all cases, a bona-fide claim of title is essential. When, however, the actual occupation of land, accompanied with such claim, continues for the period prescribed by the statute, the effect is to confer title upon the occupant without reference to the original merits of the controversy, and even against the plainest and most convincing proof of a better original title."

In *Virginia Midland Railroad Co.* v. *Barbour* (1899), 97 Va. 118, 122, the two foregoing cases were cited with approval, and it was held that a hostile "claim of title" was an essential element of adverse possession.

In *Yellow Poplar Lumber Co.* v. *Thompson* (1908), 108 Va. 612, the Creekmur case was followed, and it was held that "a bona-fide claim of title" was an essential element of adverse possession.

In *Parkersburg Co.* v. *Schultz* (W. Va.) 27 S. E. 255, it was held:

> "Mere naked possession of land, without claim of right, is no adverse possession, and no matter how long continued, will not furnish a defense to an action, or confer title."

In *Jasperson* v. *Scharnikow*, 150 Fed. 571, the United States Circuit Court of Appeals for the Ninth Circuit considered this question, and quoted with approval the following language used by the trial court:

> "This idea of acquiring title by larceny does not go in this country. A man must have a bona-fide claim, or believe in his own mind that he has got a right as owner, when he goes upon land that does not belong to him, in order to acquire title by occupation and possession. The defendant's evidence fails to show any claim of right in Bryant when he went on the land. There is not a particle of testimony that squints in the direction that he supposed that he had any right, or that he went there for any other purpose than to acquire right, if he could do so by holding long enough without molestation."

It is true that this decision was based upon a statute of the State of Washington, which provided that the party must be in possession under a claim and color of title "made in good faith." But in view

of the Virginia doctrine announced in *Creekmur* v. *Creekmur*, 75 Va. 430, 435, and other cases, to the effect that "a bona-fide claim of title is essential" we think the Jasperson case is pertinent.

CONCLUSION.

Here is a case where the Vue de L'Eau Company had the record title to the land in controversy, and by virtue of its title papers was in constructive possession thereof under the Virginia law. The Norfolk-Hampton Roads Company, knowing that it had no right, title or interest in this land, deliberately sought to acquire it by adverse possession. The acts which it did in this attempt to take the land of another are set forth in the Findings of Fact of the Court of Claims. Under the Virginia law, the burden of proof is upon the Norfolk-Hampton Roads Company to show by clear and convincing evidence that it had actual, uninterrupted, adverse possession of this land for a period of fifteen years.

We respectfully submit, that the Norfolk-Hampton Roads Company has failed to sustain this burden, that the conclusions of law of the Court of Claims are not justified by its own Findings of Fact, and such being the case, the record title of the true owner, the Vue de L'Eau Company, must prevail.

If our views as to this are correct, then it follows that the Vue de L'Eau Company was the owner of the land in controversy on June 28, 1917, when it was

taken by the United States, and that its Receiver is entitled to recover of the United States its vaule, viz., $33,000.00.

We ask that the judgment of the Court of Claims rendered on the 28th day of June, 1922, be reversed and that this Court render a judgment in favor of Guaranty Title and Trust Corporation, Receiver of Vue de L'Eau Company, against the United States, for the sum of $33,000.00.

Respectfully submitted,

E. R. F. WELLS,
Attorney for Guaranty Title and Trust Corporation, Receiver of Vue de L'Eau Company.

FILED
MAY 8 1923
WM. R. STANSBURY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1922.

No. 552. 109

GUARANTY TITLE AND TRUST CORPORATION, Receiver of VUE DE' L'EAU COMPANY, a corporation,

Intervenor, Appellant,

v.

THE UNITED STATES.

Motion of Norfolk Hampton Roads Company for leave to be heard as a party appellee; and motion of same that appellant be required to give security for damages and costs, with brief in support of said motions.

H. H. RUMBLE,
Attorney for Norfolk-Hampton Roads Company.
Norfolk, Virginia.

RUMBLE & RUMBLE,
Of Counsel for Norfolk-Hampton Roads Company.
Norfolk, Virginia.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1922.

No. 552.

GUARANTY TITLE AND TRUST CORPORATION, Receiver of VUE DE' L'EAU COMPANY, a corporation,

Intervenor, Appellant,

v.

THE UNITED STATES.

To E. R. F. Wells, Esq., and W. Leigh Williams, Esq., Attorneys for the Appellant,

To the Honorable, the Attorney-General of the United States:

You will please take notice that on Monday, the 21st day of May, 1923, at the coming in of the Court, or as soon thereafter as counsel can be heard, the fol-

lowing motions will be submitted to the Supreme Court of the United States:

(a) A motion that Norfolk-Hampton Roads Company be admitted as a party appellee to the above-entitled cause, and entered as such upon the docket and records of said Court, with leave to defend therein and file a brief and participate in the argument of said cause in all respects as if said company had originally been named as one of the appellees in said cause; and

(b) A motion that appellant be required, within such time as the said Court may prescribe, to give bond with good security in a penalty to be fixed by said Court, conditioned that the appellant shall prosecute its appeal to effect, and if it shall fail to make its plea good, that it shall answer all damages and costs; or failing to give such bond as required, that said appeal be dismissed; the order requiring such bond so to provide.

A copy of the said motion and of the brief in support thereof is hereunto attached, and delivered to you and each of you at the time of the service of this notice.

Very respectfully,

H. H. RUMBLE,

Attorney for Norfolk-Hampton Roads Company.

Due and legal service of the foregoing and annexed notice with copies of motions and brief attached, accepted and acknowledged this 23d day of April, 1923.

WILLIAM LEIGH WILLIAMS,
E. R. F. WELLS,
Attorneys for Appellant.

Due and legal service of the foregoing and annexed notice with copies of motions and brief attached, accepted and acknowl- this 26th day of April, 1923.

The United States have no objection to the granting of the said motions.

JAMES M. BECK,
Solicitor General, for the United States.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1922.

No. 552.

GUARANTY TITLE AND TRUST CORPORATION, Receiver of VUE DE' L'EAU COMPANY, a corporation,

Intervenor, Appellant,

v.

THE UNITED STATES.

Comes now Norfolk-Hampton Roads Company, and moves this Honorable Court as follows:

(a) That said Norfolk-Hampton Roads Company be admitted a party appellee to the above-entitled cause, and entered as such upon the docket and records of said Court, with leave to defend therein and file a brief and participate in the argument of said cause in all respects as if said company had originally been named as one of the appellees in said cause; and

(b) That appellant be required, within such time as the said Court may prescribe, to give bond with good security in a penalty to be fixed by said Court, conditioned that the appellant shall prosecute its appeal to effect, and if it fail to make its plea good, that it shall answer all damages and costs; or failing to give such bond as required, that said appeal be dismissed; the order requiring such bond so to provide.

BRIEF IN SUPPORT OF MOTIONS.

This case presents a situation entirely unusual in appeals from the United States Court of Claims. Ordinarily a controversy before that Court is between a single plaintiff or group of plaintiffs on the one hand, and the United States on the other. Here Norfolk-Hampton Roads Company, the mover, was the original plaintiff in the court below. Guaranty Title & Trust Corporation, as Receiver, intervened in that suit, claiming that it, and not the plaintiff, was entitled to recover from the United States, the value of a part of the lands taken from the plaintiff. The Court entered judgment in favor of the plaintiff, Norfolk-Hampton Roads Company, and dismissed the petition of the intervenor. From this judgment the intervenor appealed. The United States did not appeal.

Norfolk-Hampton Roads Company, though not cited to appear herein and not named in the record as a party to this appeal, is, nevertheless, interested in the result, and a necessary party.

The above facts are more fully and particularly set forth in the following statement.

STATEMENT.

This is an appeal from the judgment of the United States Court of Claims entered on the 26th day of June, 1922, in the suit of Norfolk-Hampton Roads Company, Plaintiff, and Guaranty Title and Trust Corporation, Receiver of Vue de L'Eau Company, Intervenor, *v.* The United States.

The suit was brought by Norfolk-Hampton Roads Company to recover the value of certain land known as the "Pine Grove Block," which was taken from the plaintiff company for the United States by proclamation of the President, June 28th, 1917, pursuant to an act of Congress authorizing the establishment of a Naval Operating Base, Hampton Roads, Virginia. (Act June 15th, 1917, Public, number twenty-three, Sixty-Fifth Congress).

In its petition the plaintiff, Norfolk-Hampton Roads Company, alleged that at the time of the taking it owned and occupied the entire block; that title and possession thereof were taken from the plaintiff by the United States; and that no part of the value had been paid; and prayed judgment for such value.

This suit was brought on December 7th, 1920. On April 12th, 1921, the Circuit Court of the City of Norfolk, Virginia, appointed Guaranty Title and Trust Corporation, Receiver of Vue de L'Eau Company, and authorized it to assert a claim against the United States for the value of a part of the said land.

Thereafter, on May 31st, 1921, Guaranty Title and Trust Corporation, as such receiver, filed its petition of intervention in the aforesaid suit of Norfolk-Hampton Roads Company *v.* The United States, claiming that at the time of the taking of said land Vue de

L'Eau Company had title to a portion thereof, and asserting a claim against the United States for the value of such portion. Evidence was afterwards taken on behalf of the Intervenor, and on May 22d, 1922, the case was argued before the Court of Claims and submitted, counsel for both Plaintiff and Intervenor conceding that that Court had jurisdiction to hear and determine the whole controversy.

On June 26th, 1922, the United States Court of Claims filed its findings of fact, wherein among other things, the said Court found the value of that portion of said land which was not in dispute to be the sum of $35,500.00; and the value of that portion thereof claimed by both plaintiff, Norfolk-Hampton Roads Company, and the said Intervenor, the sum of $33,000. As a conclusion of law on said findings of fact said Court held that the plaintiff, Norfolk-Hampton Roads Company, is entitled to recover the sum of $68,500, the value of the whole of said tract as found therein, both the portion in dispute and the portion not in dispute; and that the intervenor, Guaranty Title and Trust Corporation, Receiver, is not entitled to recover.

Thereupon, in conformity with said conclusion of law, the said Court entered judgment in favor of the plaintiff, Norfolk-Hampton Roads Company, against the United States for the said sum of $68,500, and by the same order, dismissed the petition of the Intervenor with judgment in favor of the United States for such part of the cost of printing the record in said cause as is properly chargeable to the Intervenor, the amount to be entered by the Clerk, said costs as determined by the Clerk amounting to $105.39.

From the aforesaid judgment in favor of the plain-

tiff, Norfolk-Hampton Roads Company, the United States took no appeal.

On August 1st, 1922, the Intervenor, Guaranty Title and Trust Corporation, applied for and obtained an appeal from the said judgment.

No citation was served on Norfolk-Hampton Roads Company. The Clerk below does not seem to have regarded that company as a party to the appeal. Its name nowhere appears on the record as appellee. This was doubtless due to the unusual character of the appeal.

After the appeal was taken, viz., in November, 1922, the United States, with the consent of the Intervenor, expressed by formal stipulation, paid to Norfolk-Hampton Roads Company, on account of said judgment, the sum of $35,500, representing the value of that portion of said lands which was not in dispute. The Government has not paid, and pending said appeal, of course will not pay to the plaintiff the balance of said judgment. That balance, the sum of $33,000, is the amount in controversy on this appeal.

ARGUMENT.

Motion (a). On the facts disclosed by the printed record as amplified and explained in the foregoing statement, it is clear that Norfolk-Hampton Roads Company is a necessary party on this appeal. It is entitled to defend the judgment in its favor. It is, if anything, more interested in the result than the United States, the nominal appellee. The cause cannot proceed in its absence. No argument is needed, therefore, to show the propriety of granting its motion,

that it be entered upon the record as a party appellee with leave to defend the judgment in its favor in all respects as if it had been originally named a party appellee.

Motion (b). It would seem equally clear that appellant should be required to give bond to cover interest and costs. In the ordinary appeal from the Court of Claims, only the plaintiff and the United States are interested. No bond is needed in such case and none is required.

Here, however, we have the unusual situation of an appeal by an intervenor from a judgment in favor of the plaintiff; the defendant, the United States, being satisfied with the judgment and taking no appeal.

The effect of the appeal was to prevent the full payment of the judgment in favor of the plaintiff, Norfolk-Hampton Roads Company. But for the appeal, the Government would have paid the whole judgment, $68,500, when it paid the $35,500 on account thereof. Payment of the balance of the judgment, $33,000, has been effectually stopped by the appeal. The latter operated as a supersedeas.

The judgment bears no interest as against the United States. If affirmed on appeal, the principal only will be paid by the United States, however long the time that may elapse before the case is disposed of.

In that situation it is but just that the intervenor, if unsuccessful in its appeal, pay the plaintiff interest on the sum of $33,000 for the time payment was prevented by the appeal. As against the United States, the intervenor has the right to appeal without giving bond, but not as against a private party whose judgment is *ipso facto* suspended by the appeal.

It is to be observed in this connection that the intervenor, Guaranty Title and Trust Corporation, is

suing in a representative capacity only. It sued as receiver. It would not be personally liable on a judgment for interest and costs; and it has no fund out of which such judgment could be satisfied.

It is therefore just and proper that the intervenor be required to give bond with good security to cover interest and costs; and that its appeal be dismissed, if having been required to give such bond, it shall fail to comply with the order of the Court. Such requirement would seem to be at least within the spirit of R. S. Sec. 1000, Compiled Stat., Sec. 1660.

Nor can we doubt that independently of statute, this Honorable Court, in the exercise of its inherent power to do justice between the parties before it, has the authority so to require and direct.

Where an appeal bond is not given as required by statute, this Court will on motion require it to be given within a prescribed time, and in default thereof will dismiss the appeal.

Catlett v. *Brodie*, 9 Wheat, 553.
Anson, Bangs & Co. v. *The Blue Ridge R. R. Co.*, 23 How. 1.
Peugh & Davis, 110 U. S. 227.
Dodge v. *Knowles*, 114 U. S., 436.

It is respectfully submitted that both of said motions should be granted.

Very respectfully,

H. H. RUMBLE,
Attorney for Norfolk-Hampton Roads Company.

H. H. RUMBLE, Norfolk, Va.,
Attorney for Norfolk-Hampton Roads Company.

RUMBLE & RUMBLE, Norfolk, Va.,
Of Counsel.

FILED
MAY 18 1923
WM. R. STANSBU
CLE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1922.

No. [redacted] 109

GUARANTY TITLE AND TRUST CORPORATION, Receiver of VUE DE L'EAU COMPANY, a corporation,

Intervenor, Appellant,

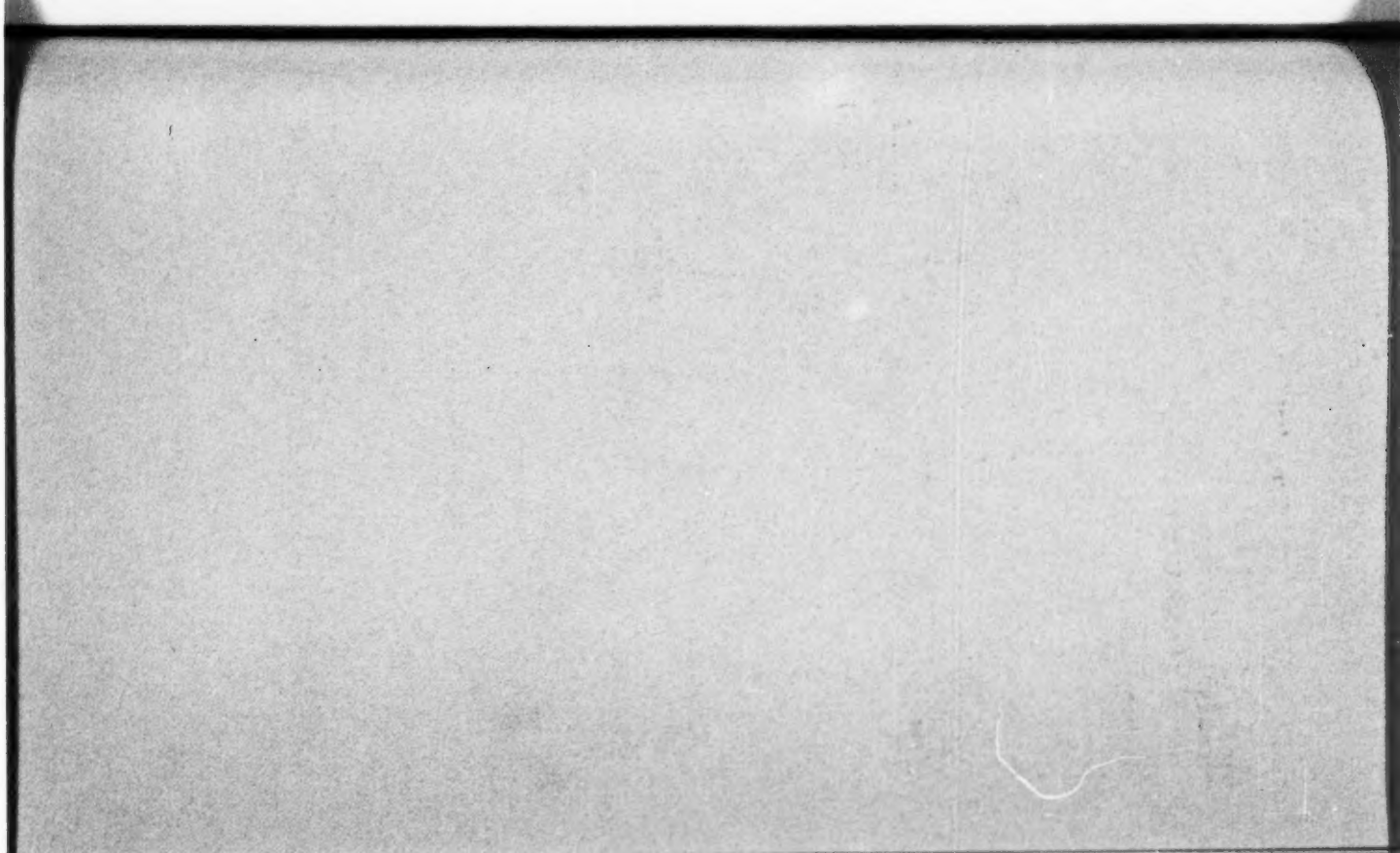
v.

THE UNITED STATES.

REPLY TO APPELLANT'S "BRIEF IN OPPOSITION TO MOTION B, MADE BY NORFOLK-HAMPTON ROADS COMPANY."

H. H. RUMBLE,
Attorney for Norfolk-Hampton Roads Company.

RUMBLE & RUMBLE,
Of Counsel, Norfolk, Va.



IN THE

Supreme Court of the United States

OCTOBER TERM, 1922.

No. 552.

GUARANTY TITLE AND TRUST CORPORATION, Receiver of VUE DE L'EAU COMPANY, a corporation,

Intervenor, Appellant,

v.

THE UNITED STATES.

REPLY TO APPELLANT'S "BRIEF IN OPPOSITION TO MOTION B, MADE BY NORFOLK-HAMPTON ROADS COMPANY."

Counsel for the appellant contend that the appeal in this case did not operate as a *supersedeas* to the judgment appealed from; and on this ground chiefly, base their opposition to motion (b) of Norfolk-Hampton

Roads Company that the appellant be required to give security for damages and costs.

The attention of the Court is respectfully invited to the fact that the appellant voluntarily intervened in the suit then pending in the Court below between Norfolk-Hampton Roads Company and the United States. By that act it admitted that the Court of Claims had jurisdiction to determine the whole controversy.

That Court had in a number of cases arising under the Abandoned and Captured Property Acts, sustained its jurisdiction to decide the question of title as between conflicting claimants, in some cases entertaining intervening petitions, and in others requiring separate suits for the proceeds of the same property to be consolidated and heard together.

Turner v. *The United States*, 2 Ct. of Cl. 390.

Woodruff v. *The United States*, 4 Ct. of Cl. 486.

Hill v. *The United States*, 8 Ct. of Cl. 361.

Counsel for the appellant, then the intervenor, united with counsel for Norfolk-Hampton Roads Company, then the plaintiff, in a memorandum which was submitted to the Court of Claims, urging that that Court had jurisdiction to determine the whole controversy, and citing the above cases as authority.

The case was submitted to the Court of Claims on that theory, and on that theory decided. The judgment entered by the Court of Claims on June 26, 1922, disposed of the whole controversy. Counsel

say, appellant did not ask for a *supersedeas* to that judgment. True, but it did what amounted to the same thing so far as stopping payment is concerned. It appealed from that judgment. It is to be observed that the appeal was not from so much of the judgment as dismissed the intervenor's petition; but from the *whole* judgment. (Record, p. 16.) That necessarily brought up the whole controversy to this Court.

If, as contended, the appeal now pending concerns only the appellant and the United States, it is difficult to see why appellant does not oppose motion (a), that Norfolk-Hampton Roads Company be admitted as a party appellee. If that contention were sound, the latter company would have no right to intervene.

It is submitted that appellant having elected to intervene in the suit of Norfolk-Hampton Roads Company v. The United States, instead of bringing a separate suit; and having submitted its claim for the determination of the Court in that suit, litigating therein its rights as against those of Norfolk-Hampton Roads Company, and having appealed from the judgment of that Court disposing of the whole controversy, should not now be heard to say that the appeal concerns only itself and the United States.

Counsel further suggest that no security is necessary because appellant when appointed receiver of Vue de L'Eau Company gave bond as such. It need hardly be pointed out that the bond of a receiver is conditioned for the faithful discharge of his duties as receiver; and that while it would cover his

failure to account for moneys received, it would not cover his liability to third parties where no assets have come into his hands.

It is very respectfully submitted that both motion (a) and motion (b) should be granted.

H. H. RUMBLE,

Attorney for Norfolk-Hampton Roads Company.

RUMBLE & RUMBLE,

Of Counsel, Norfolk, Va.